

LEGAL REVIEW NOTE

LC#: LC1040, To Legal Review Copy, as of
January 9, 2013

Short Title: Federal law enforcement officers
should communicate with sheriff

Attorney Reviewers: Helen Thigpen/Todd Everts

Date: January 15, 2013

CONFORMITY WITH STATE AND FEDERAL CONSTITUTIONS

As required pursuant to section 5-11-112(1)(c), MCA, it is the Legislative Services Division's statutory responsibility to conduct "legal review of draft bills". The comments noted below regarding conformity with state and federal constitutions are provided to assist the Legislature in making its own determination as to the constitutionality of the bill. The comments are based on an analysis of relevant state and federal constitutional law as applied to the bill. The comments are not written for the purpose of influencing whether the bill should become law but are written to provide information relevant to the Legislature's consideration of this bill. The comments are not a formal legal opinion and are not a substitute for the judgment of the judiciary, which has the authority to determine the constitutionality of a law in the context of a specific case.

Legal Reviewer Comments:

LC 1040 provides that federal employees who are not Montana peace officers must obtain the written permission of a county sheriff to execute an arrest, search, or seizure in the county where the arrest, search, or seizure will occur, except under certain circumstances. The county sheriff may refuse permission for any reason. Federal employees may exercise one of the enumerated exceptions in the draft by requesting and receiving the written permission of the Montana Attorney General. Similarly, the Attorney General may refuse the request for any reason.

There are several consequences provided in the proposed legislation for noncompliance. For example, as drafted, any arrest, search, or seizure in violation of LC 1040 would subject the federal employee to prosecution by the county attorney for kidnapping or various other offenses. A county attorney would be required to prosecute a claim by the county sheriff, and any failure to prosecute could subject the county attorney to recall by the voters and prosecution for official misconduct.

As drafted, LC 1040 may raise potential legal issues regarding whether the proposed legislation complies with federal law. The Supremacy Clause of the U.S. Constitution provides:

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

U.S. Const., Art. VI, cl. 2. The Supremacy Clause provides that if a conflict between state and federal law exists, federal law controls and state law is preempted. The U.S. Supreme Court has held that “[U]nder the Supremacy Clause, from which our pre-emption doctrine is derived, ‘any state law, however clearly within a State’s acknowledged power, which interferes with or is contrary to federal law, must yield.’” *Gade v. National Solid Wastes Mang. Assoc.*, 505 U.S. 88, 108 (1992). In addition, the U.S. Supreme Court has held that states must “enact, enforce, and interpret state law in such fashion as not to obstruct the operation of federal law . . .” *Printz v. U.S.*, 521 U.S. 898, 913 (1997).

The proposed legislation could prohibit federal employees from investigating suspected violations of federal law and potentially enforcing federal law. As such, the legislation, if passed by the Legislature and approved by the voters, may raise conformity issues with the Supremacy Clause of the U.S. Constitution. If a federal statute required a federal employee to investigate and enforce a federal law, but the county sheriff refused to grant permission to the employee, the federal agent could not comply with both the state and federal law. The U.S. Supreme Court has held on several occasions that federal preemption exists when “compliance with both federal and state regulation is a physical impossibility”. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963); *See also McDermott v. Wisconsin*, 228 U.S. 115 (1913). The legislation may also prohibit or interfere with a properly issued warrant from a federal judge, which could directly impede federal law enforcement efforts.

There may be additional legal issues associated with the proposed legislation, however, due to time constraints, this note focuses on the legal issues that would most likely be raised with respect to LC 1040, as drafted. The Attorney General of South Carolina provided a more detailed explanation of the legal issues associated with similar legislation introduced in that state in 2011. That opinion may be accessed at:
<http://www.scag.gov/wp-content/uploads/2011/12/moore-j-b-os-9359-12-9-11-constitutional-validity-of-proposed-sheriffs-first-legislation.pdf>

Requester Comments: See attached.

From: Gary Marbut [mailto:Gary@Marbut.com]
Sent: Wednesday, December 12, 2012 4:38 PM
To: Thigpen, Helen
Cc: Krayton D. Kerns; Austin Knudsen
Subject: Re: LC 1040

Helen,

Re: LC 1040, "Sheriffs First"

I wish to respond to you thoroughly and carefully about this, since our dialog may become a part of or affect the legislative record for this bill.

Federal laws only supersede state laws under the Supremacy Clause (and Necessary and Proper Clause) when they implement powers specifically authorized to Congress in the U.S. Constitution. There are several significant points to made about this:

- 1) Police power. Congress is not given the general "police power" under the Constitution, which power is generally reserved to the states. Because of that, the states are generally given preeminence in enforcing state-enacted criminal laws. For example, no federal law could effectively give federal employees a carte blanche to be exempt from Montana criminal laws. That is, federal employees, simply by virtue of the identity of their employer, could not commit murder, rape, robbery, or other actions criminalized by Montana law, with impunity. Which leads to:
- 2) Qualified immunity. One of the defenses that federal employees have claimed to exempt them from state laws is "qualified immunity." This is a modern version of the historically failed "just following orders" defense attempted in the Nuremberg Trials following WWII. This defense was substantially muted for Montana by the Ninth Circuit in the criminal prosecution by the State of Idaho of Lon Horiuchi, the FBI sniper who killed Vicki Weaver in the federal standoff at Ruby Ridge, Idaho. In that case, Horiuchi was charged by Boundary County Idaho with manslaughter. On a motion by the U.S., the case was removed to federal court, where qualified immunity was pled by Horiuchi. In response, the federal district court dismissed the charges. Boundary County appealed to the Ninth Circuit, which reversed the district and remanded the case back to Idaho state court in Boundary County for further prosecution, saying that qualified immunity was not a bar to Idaho's prosecution of Horiuchi for violating Idaho criminal law. Another case on this point comes from Montana, Groh v. Ramirez, wherein the U.S. Supreme Court held that Agent Groh of the Bureau of Alcohol, Tobacco and Firearms was not entitled to qualified immunity in protection for a civil action against him in performance of his official federal duties.
- 3) Tenth Amendment. Looming over all of this is the Tenth Amendment. I understand that law schools teach that the Tenth Amendment is effectively meaningless and irrelevant. Fortunately, the U.S. Supreme Court does not agree with this reputed dismissal. In a very recent decision, Bond v. U.S., a unanimous U.S. Supreme Court has

given current recognition to the validity and effect of the Tenth Amendment. This is a stunning decision, both because it was unanimous, and because of the strong language used affirming the role of the Tenth Amendment.

Further, it is an ancient principle of law that if there is a conflict between two provisions of a co-equal body of law, the most recently enacted must be given deference as the most recent expression of the enacting authority. It is beyond debate that the Tenth Amendment was enacted subsequent to the Supremacy Clause. If there is conflict or tension between the two, the Supremacy Clause must yield, as is affirmed by Bond. It cannot be said that amendments to the Constitution don't affect underlying provisions, and previously-enacted provisions of the Constitution, else we would still have Prohibition, and the 21st Amendment would not have been able to repeal the 18th Amendment. Thus, the Tenth Amendment actually amends - affects, changes - the underlying, previously-enacted Constitution, including (as needed) the Supremacy Clause (and the Necessary and Proper Clause).

4) Montana's contract for statehood. When Montana entered into statehood in 1889, that entry was made by contract, a contract we call the "Compact With The United States," memorialized at Article I of the Montana Constitution, and also involving Ordinance 1 of the Montana Legislature and the Enabling Act of Congress (acting as agent for the several states). Note that "contract" and "compact" are essentially synonymous, except that compacts are more usually entered into between states, but all other definitions and understandings apply the same to both. In the documents ancillary to the Compact with the United States (Ordinance 1 and Enabling Act), Montana agreed to accept the U.S. Constitution, and Congress (acting as agent for the several states) agreed to accept the Montana Constitution. A contract must be interpreted so as to give meaning to terms and understandings common, available and relied upon at the time the contract was established. Because Montana agreed to accept the U.S. Constitution in 1889, and the U.S. agreed to accept Montana's acceptance, that locked in time the understanding of the U.S. Constitution that existed in 1889, an understanding that took a much narrower view of the Supremacy Clause than may have existed, say, in 2000. In looking at the effect of the Supremacy Clause, Montana's contract rights under longstanding principles of contract law cannot be simply blinked away.

For these good reasons, I caution you and the Legislative Services Division to be careful about any claim that LC 1040 is unconstitutional. You may argue that the U.S. has the wherewithal to make life difficult for Montana if it should enact LC 1040, but it is very problematic to sustain any theory that LC 1040 is somehow unconstitutional.

Please make sure these comments are a part of any legal review of LC 1040.

Sincerely,

Gary Marbut